No. 1407

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

CHARLES H. MERRIAM, as Registrar of Conveyances of the Territory of Hawaii,
Defendant in Error.

Brief of Defendant in Error, Charles H. Merriam, as Registrar of Conveyances of the Territory of Hawaii.

Upon Writ of Error to the United States District Court for the Territory of Hawaii.

E. C. PETERS,
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For Defendant in Error.

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BRIEF OF DEFENDANT IN ERROR, CHARLES H. MERRIAM AS REGISTRAR OF CONVEYANCES OF THE TERRITORY OF HAWAII.

STATEMENT OF THE CASE.

On the 11th day of February, A. D. 1905, the United States of America filed in the District Court of the United States, in and for the District and Territory of Hawaii, its petition for condemnation of certain land for public uses then owned or claimed to be owned by J. W. Kawai and others. (Goverment's Exhibit No. 1, Record pages 129 to 141, both inclusive). On the 4th day of March thereafter, all the respondents, with the exception of J. W. Kawai and Manikuaole, his wife, filed their joint answer to said petition (Government's Exhibit No. 2, Record pages 142 to 148, both inclusive). J. W. Kawai and his

wife having failed to answer, a judgment upon default against them was duly and regularly entered in said cause on the 5th day of July A. D. 1905. (Government's Exhibit 3, Record pages 149 to 155, both inclusive). Of such judgment we will hereafter speak as the "Kawai" Judgment.

On the 14th day of July such other and further proceedings were had in said cause that a judgment was duly signed, entered and filed in said cause in favor of the petitioner and against the defendants and respondents who had answered, which judgment will hereafter be spoken of as the "Waterhouse" Judgment.

To the petition (Record page 86½), the "Kawai" Judgment (Record page 100) and the "Waterhouse" judgment (Record page 114) was annexed and made an inseparable part thereof a paper blue print map of the land subject to the proceedings. While the condemnation proceedings were pending, but before either the "Kawai" or "Waterhouse" judgment were obtained the legislature of the Territory of Hawaii, at its 1905 session passed, and on to wit, the 3rd day of April, A. D. 1905, was duly approved and then became law, Act 23 of the Session Laws for that year. The Act is as follows:

"Section 1. The Registrar of Conveyances shall, on "application ,accept and file in the archives of his office, "on the payment of a fee of one dollar, any plan of land, "but such plan must contain the name of the owner of "the land and his address, the maker's name and ad- "dress, the surveyor's name and address, date of survey, "scale, the meridian line, areas, name of Ili or Ahupuaa, "district and island, the true bearings and lengths of "principal lines, the names of all known adjoining own- "ers, and such data concerning the original title of the "land platted, as may be known. It shall be necessary "that one or more monuments shall be placed on the

"land which shall, if possible, connect with the Govern-
"ment triangulation system. All such monuments shall
"be placed as indicated on the plan.

Section 2. A description of the land platted shall "be written upon said plan, and all outside corners of "said tract shall be substantially marked by monu-"ments on the ground, where practicable; provided, "however, that in all cases where tracts of land are sub-"divided into lots, with the intention of conveying said "separate lots by lot number and reference to such plat, "it shall be necessary to show the true bearings and "lengths of a sufficient number of principal lines, and a "sufficient number of monuments shall be located on "the ground so as to accurately identify each lot.

"Section 3. All such plans must be on tracing cloth "of a size not greater than 36 by 42 inches, and the scale "thereof must be some one of the following, viz: 10 feet, "20 feet, 30 feet, 50 feet, 100 feet, 200 feet, 500 feet, 1000 "feet or 5000 feet to an inch.

"Section 4. It shall not be unlawful for the Regis-"trar of Conveyances to accept for record and record "any plan of land after this Act takes effect.

"Section 5. This Act shall take effect from and after "the date of its approval."

Thereafter, and on to wit the 1st day of August, A. D. 1905, the United States of America, by its duly authorized agent, offered to the respondent, as Registrar of Conveyances of the Territory, for recordation and requested that he receive for recordation and record as a whole a certified copy of the "Waterhouse" judgment, which the Registrar refused to receive for recordation or record, on the grounds that, if entitled to recordation as an entirety, the plan, drawing or blue print attached thereto did not comply with the provisions of Sections 1, 2 and 3 of said Act 23 in respect ,among other things, to the provisions there-

of requiring the plan to contain the name of the owner of the land and his address, meridian line, the name of the Ili or Ahupuaa, district and island, the true bearings of principal lines, data concerning original title of the land platted, and description of the land, and that the plan was not on tracing cloth of a size of 36x42 inches or less (see paragraph 4 of Answer, Record pp. 38 and 39); and further and more particularly that it was not his duty to receive the plan for record or even for filing for the reason that the Laws of the Territory made the receipt of such plan unlawful.

On the 9th day of October following, the United States instituted this proceeding.

BRIEF OF THE ARGUMENT.

No question was raised by the petitioner as to the propriety or legality of Act 23 of the Session Laws of 1905 other than that the Act is not applicable for the reason that it could not effect pending actions instituted prior to the approval of the Act and based its contention upon the following grounds:

(1) That Act 23 of the Session Laws of 1905 does not effect pending proceedings;

(2) That the law of the case is the law at the time of the inception of the case;

(3) That the legislation is retrospective;

(4) That statutes must operate prospectively; and

(5) That the construction of statutes is against retrospective legislation.

The several grounds raised can be practically treated together and considered as one objection to the applicability of the Act to the then pending action for condemnation, under the general objection that the same is retroactive legislation effecting vested rights, and the discus-

sion of this general objection covers the errors assigned by plaintiff in error, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14.

THE LOCAL LAW DEFINING THE PROCEDURE IN CONDEMNATION DOES NOT REQUIRE THE INCORPORATION OF A MAP IN THE FINAL ORDER OF CONDEMNATION.

Proceedings for condemnation instituted by the United States in its courts must conform to the local practice. Section 506 of the Revised Laws of Hawaii provides:

> "Section 506. Final order of condemnation. When "all payments required by the final judgment have been "made the court shall make a final order of condemna- "tion, which must describe the property condemned and "the purposes of such condemnation, a certified copy of "which must be filed and recorded in the office of the "Registrar of Conveyances; and thereupon the property "described shall vest in the plaintiff."

The section specifically provides what the final order of condemnation must contain and it makes absolutely no mention of a map. It only provides that there must be a description of the property condemned, and the purposes of the condemnation. Further than that it does not go. And the legal duty devolving upon the Registrar of Conveyances is to receive for recordation and record a certified copy of a final order which complies with Section 506. The plaintiff in error may contend that Section 499 impliedly requires that the final order of condemnation contain a map for the reason that by that section is provided that "a map must accompany the complaint, which shall correctly delineate the lands sought to be condemned and its location." Section 499 is as follows:

> "Sec. 499. Petition, defendants, different properties "in one action. Actions under and by virtue of this

"chapter, must be commenced by filing a petition and "issuing a summons thereon. All persons who are own- "ers or claimants of the property sought to be condemn- "ed must be joined as defendants; provided, however, "that in case the owner or claimant is unknown to "plaintiff, it shall be sufficient if the petition includes a "statement of that fact, and such defendant may be "joined in the petition under a fictitious name. This "petition must also contain a statement of the use to "which the land sought to be condemned is to be put "a description of each and every piece of land sought to "be condemned, and whether the same includes the "whole or only a part of an entire tract or parcel. A "map must accompany the complaint which shall cor- "rectly delineate the land sought to be condemned and "its location.

"All property necessary for any public use may be "united in one action."

But the section prescribing the contents of a petition cannot effect the section which applies to the final order of condemnation. Proceedings in condemnation are purely statutory. And being such they must be strictly complied with; but a provision concerning one stage of the proceeding cannot by implication be made applicable to another stage of the proceeding. The provision that a map must accompany the petition in addition to the description in the body of the petition of the piece of land sought to be condemned was obviously intended to give greater certainty to the pleading and the fullest data obtainable to the parties effected by the proceeding. On the other hand, Section 506 is intended to give both actual and constructive notice of the transfer of title and provides the method by which the successful petitioner in condemnation proceedings may comply with the Territorial law concerning the recordation of instruments effecting real property.

Even construing Section 506 not to exclude other material and pertinent matters which might legitimately be incorporated in the final order of condemnation, had Act 23 of the Session Laws of 1905 been in force and effect as law prior to the institution of the condemnation proceedings, it could not then be successfully contended that the provisions of the Act concerning the style and filing of maps would not effect a final order of condemnation, which contained a map delineating the land subject to the proceedings. So that whether in existence prior or subsequent to the institution of the condemnation proceedings, as long as the Act was in effect prior to the signing and entry of judgment, the question resolves itself into the one of whether or not a remedy or a vested right was effected by its passage.

ACT 23 OF THE SESSION LAWS OF 1905 NEITHER EFFECTS ANY VESTED RIGHTS NOR IMPOSES ANY LIABILITIES UPON THE UNITED STATES DIFFERENT FROM WHAT EXISTED PRIOR TO THE PASSAGE OF THE ACT.

The Act in question is not retrospective in its operation nor does it effect vested rights, nor does it impose additional liabilities upon the United States different from what existed prior thereto. It is simply an act effecting the procedure in a civil cause and became operative in its effect immediately upon its passage, both as to actions accrued prior to the passage of the Act, and actions pending at the time of its enactment. If it can be said that the Act is retroactive by reason of the fact that it effects an action, the right of which accrued prior to its passage, we may say, even though thus retroactive it is not objectionable. Retroactive legislation is not objectionable per se. It is only when in its retroactive operation it effects

vested rights or imposes new liabilities. A final order of condemnation after the passage of the Act without a map is and was just as good for the purposes of recordation under the registry laws as a judgment secured prior to the passage of the Act.

The judgment in the condemnation proceedings was not secured prior to the passage of the Act, but the proceedings were then pending, and the judgment was a matter of securement in futuro. And if there were a right to have as a portion of the final order a map, was such right one of property or one merely of procedure? The presence or absence of a map is certainly simply one of procedure for the reason that a final order after the passage of the Act without a map performs exactly the same function, by virtue of the recordation, as a final order of condemnation containing a map secured and recorded prior to the passage of the Act.

"No person has a vested right in any course of pro-"cedure * * * he has only the right of prosecution "or defense in any manner prescribed for the time be-"ing or for the Court in which he sues; and if the stat-"ute alters that mode of procedure he has no other "right than to proceed according to the altered mode. "At best the statute can be considered as only effecting "procedure, and if retrospective ,it is only retrospective "to the extent of effecting the procedure relative to "judgment subsequently secured upon an antecedent "right of action and pending proceedings. Retrospect-"ive legislation is only obnoxious with reference to "statutes impairing rights existing at the time of their "passage, or creating new obligations, or imposing new "duties, or attaching new disabilities in respect to "transactions or considerations already passed."

Sedg. Stat. Const., 188, cited with approval in Judd v. Judd, 125 Mich. 233.

"Statutes relating merely to the remedy for wrongs, "or causes of action existing at the time of their pass- "age, may be considered retrospective but not obnox- "ions."

The legislature has the power to abolish all remedies for causes of actions then existing and prescribe new ones in the same cases, and such statutes should be construed liberally to advance the remedy.

Sedg. on Stat. Const., 360.

There would be neither injustice nor oppression in this as there would be in the case of a statute which created a certain right or made an act a wrong which was not of that character when the statute was passed. Laws are deemed retrospective and objectionable which by retrospective operation destroy or impair vested rights or rights to do certain acts or possess certain things according to the law of the land. But laws which effect the remedy merely are not within the scope of the inhibition unless the remedy be taken away altogether or incumbered with conditions which would render it useless or impracticable to pursue it. There would not in the nature of the thing be a vested right to a remedy which existed at the date of the contract; in other words, the mode, times and manner of prosecuting suits must be left to the regulation of the legislative authority.

Phoenix Ins. Co. v. Shearman, 43 S. W., 1063.

An interesting case in this behalf is that of Judd v. Judd, supra. The plaintiff in that case was granted a decree of divorce from defendant and awarded the custody of one of the children of the parties. The decree in addition provided for the payment by defendant to plaintiff of seventy-five dollars per month as permanent alimony. Thereafter the legislature of Michigan enacted a statute which allowed punishment for contempt in cases of disobedience to decrees in divorce. Under such power

the defendant, on non-payment of alimony, was cited for contempt and an objection was made that the statute relative to contempts had no application to the final decree entered in the divorce matter; and therefore retrospective. The court said:

"It is true the legislature cannot interfere with vest-
"ed rights, but is the act in question an interference
"with vested rights; it does not change the amount of
"the decree, it does not increase the liability of defend-
"ant. It merely provides a remedy for the collection
of a decree which defendant is legally and morally
"bound to pay."

Further the court cites with approval the following language found in Section 287 of Endlich on Interpretation of Statutes:

"In this country the general rule seems to be in ac-
"cordance with the English, that statutes pertaining to
"the remedy, that is, such as relate to the course and
"form of proceedings, for the enforcement of a right,
"but do not effect the substance of the judgment pro-
"nounced, neither directly nor indirectly destroy all
"remedy whatever for the enforcement of the right, are
"retrospective so as to apply to causes of actions sub-
"sisting at the date of their passage."

Again, in Henshall et al v. Schmidt et al, 50 Mo. 454-455, an original judgment of the court was rendered in 1860, but no execution was issued thereon until 1870, nearly ten years having elapsed. Objection was made to the issuance of the execution on the ground that notice to the adverse party had not been given under the original Act of 1860, and that execution had not been issued within five years as provided by that Act. It seems that by a subsequent statute of 1865, the motion in court and notice to adverse party were dispensed with and execution was

permitted to issue upon a judgment at any time within ten years. There the court said:

"It is now insisted that while the judgment was "rendered, while the law of 1855 was in operation, the "issuance of the execution must be governed by that "law and that the legislature was incompetent to ex- "tend the time and release the conditions therein pres- "cribed. The contention is untenable. The rule that laws "are applicable to future and not to past transactions "is not infringed or violated by up-holding this law and "applying it to all judgments. It simply regulates for "enforcing judgments and does not trench on any vest- "ed rights."

In the case of Tremont & Sulfolk Mills v. City of Lowell, 165 Mass., 265, 266, a petition was, under the statute of 1890, filed for the reduction of the valuation of petitioner's property and an abatement of the tax assessed thereon. After going to the appellate court, the case was heard in the superior court upon petitioner's motion for interest on the amount of the abatement. During the time of process of appeal, and prior to the time of the motion for interest on the amount of the abatement, to wit, in 1895, a further statutory enactment went into effect providing that in any further judgment which should thereafter be rendered under the provisions of the statute of 1890, all charges should be included, and also interest on the amount of the abatement made from the date of the payment of the tax. Judgment was so entered in the superior court and to the ruling the respondent excepted. The court said:

"In our opinion the exceptions must be overruled and "the judgment affirmed. The only question argued by "the respondent is as to the meaning of the statute of "1895. Respondent contends that it should be con-

"strued as applying only to judgments upon petitions "instituted after its passage. The plain answer to this "contention is that the explicit language of the statutes "is that such interest shall be included in every judg- "ment which shall hereafter be rendered for the amount "of an abatement of taxes made under the provisions "of Chapter 127 of the Acts of 1890. If the legislature "had intended the provisions to apply not to every judg- "ment for the amount of an abatement rendered after "1895, but only to judgments upon petitions for abate- "ment brought after that date, it would have said so."

A further case in which the amending law changed the remedy as to prospective judgment is that of County of Kossuth v. Wallace et al, 60 Ia., 508. There, Section 1873 of the code, which was in force at the time the mortgage in question was executed provided that in suits to foreclose a school fund mortgage, the court should give the plaintiff as a part of the costs such an amount as would be a sufficient compensation for the plaintiff's attorney in the case. This Act was amended in 1880 reducing the amount of attorney's fees to 10 per cent and in no case to exceed the sum of twenty-five dollars. There the court said:

"The change, we think, does not impair the obliga- "tion of the contract, but merely effects the remedy. "Statutes may constitutionally be enacted changing the "remedy existing when the contract was made if they "preserve the existing remedy in substance, and with "integrity, and do not destroy or embarrass the reme- "dies existing when the contract was made, so as to "substantially defeat the rights of the creditor."

See also Bensley v. Ellis, 39 Cal., 309, 313.

From the foregoing it is obvious that to the extent to which the statute is operative it must be considered only

as effecting the remedy and not vested rights. The rights of the United States at the time of the institution of the condemnation proceedings were that a certified copy of the final order of condemnation containing a description of the property condemned and the purposes for which it had been condemned, should be received and recorded by the Registrar of Conveyances. That right still prevails and whether either by law or custom there previously existed a right to include a map with the judgment, or have the judgment engrossed or upon parchment, or written in long hand, or on certain margins or blanks, is immaterial. The right which might accrue to the United States by virtue of the receipt and recordation of a final order of condemnation, to wit, the vesting of title and the consequent actual or constructive notice to third persons of the person in whom the title reposed, is still maintained to it, notwithstanding Act 23.

We respectfully submit that immediately upon the passage of Act 23, the United States authorities conducting the condemnation proceedings were bound to proceed according to the Territorial law, and if they desired to have as a part of their final order of condemnation, a map, it was their duty to see that the judgment complied with the laws of the Territory in force at the time of its signing and entry.

Act 23, immediately upon its becoming law, became operative as to all instruments presented to the Registrar for recordation. We are free to admit that it is a general act and does not contain words of amendment or repeal of any of the pre-existing provisions of law. It is general in its provisions and makes the recordation of a map by the Registrar unlawful. In view of its language it became operative as to final orders of condemnation as well as any other instruments permitted by law to be recorded, and all previous provisions of law applicable to

the receipt and recordation of instruments inconsistent with Act 23 were impliedly repealed to the extent of inconsistent portions thereof. No words of reference, amendment or repeal were necessary in Act 23. All previous laws inconsistent therewith, by virtue of the fact that Act 23 was the latest expression of the legislative will, must necessarily have been impliedly repealed.

Hickory Tree Road, 43 Pa. St., 139, 142.

On the 3rd day of April, 1905, Act 23 was as much a part and portion of the laws concerning proceedings in condemnation as the law pertaining to the registry of instruments effecting real property. Upon its approval a new method of procedure relative to final orders in condemnation was put into vogue and thereafter none could be recorded which contained a map as an inseparable part or portion thereof.

In this regard we desire to call the court's attention to the Pennsylvania case just cited. There six viewers had been appointed to view under the old law, and after the passage of a subsequent act providing for but three viewers, three viewers were appointed to view as directed by the act. The court held that the appointment of three was proper for the reason that the old law had been so far and in that respect changed by the repealing act; that the proceedings for damages were unchanged and that they proceed under the old law except as to the number of viewers.

To the same end is Davidson v. Wheeler, 1 Morris (Ia. Rep.) star page 238, top page 314. There the court said:

> "It was an action of replevin brought prior to but "tried subsequent to the passage or order of the present "replevin law. The proceedings on the trial should "therefore have been in accordance with the new law, "for it is a well settled rule that where the practice is "changed during the pendency of a suit, all subsequent

"proceedings as far as practicable conform to the new "laws."

See also Marks v. Crow, 14 Ore., 382, 387, where the court said:

"I think the rule should be, where the code is amend-"ed pending an action or suit, that the proceedings had "in accordance with the provisions thereof in force at "the time, should be held valid and that those taken "after the amendment goes into effect should be in con-"formity therewith."

And it is reasonable that the rule of law applied in the foregoing cases should apply to the case at bar. The evident intent of the legislature was to correct an evil which had previously existed—that of incumbering records with crude drawings in the attempt of the Registrar to make a "literal copy" of the instrument presented for recordation. It certainly was not the intent of the legislature, and no intention could be presumed from the act, to impair in any degree any rights which might accrue upon the recordation in the office of the Registrar of any instrument or instruments effecting the title to real property. And if the intention of the legislature clearly indicates that the statute is to be retroactive in its effect, to the extent of effecting accrued actions or pending proceedings, that intention of the legislature should be regarded and as far as practicable enforceed by the courts.

The better rule of construction and the rule peculiarly applicable to remedial statutes is that a statute must be so construed as to make it effect the evident purpose for which it was enacted; and if the reason of the statute extends to past transactions as well as to those in the future, then it will be so applied, although the statute does not in terms so direct, unless to do so would be im-

pairing some vested right or violating some constitutional guaranty.

Conn. Mutual Life Ins. Co. v. Talbot, 113, Ind., 373, 378.

Other cases in which remedial statutes have been held to effect pending proceedings are as follows:

S. Ind. R. R. Co. v. Paten, 157 Ind., 690, 693;
Winslow v. The People, 117 Ill., 152, 158;
Clarke v. Troy, 20 Cal., 220, 224;
Ralston v. Lothian, 18 Ind., 303, 305;
Logan v. Logan, 77 Ind., 558, 560;
Kille v. Reading Iron Works, 134 Pa. St., 225, 226;
Phoenix Ins. Co. v. Shearman (Supra);
Judkins v. Toffe, 21 Ore., 89, 91;
Burroughs v. Vandevier, 83 O., 383;
See Enc. of L., 2nd. Ed., vol. 26, p. 695, 696.

Our Supreme Court, in interpreting Section 5 of the Revised Laws of Hawaii, which provides that "no law shall have any retrospective operation," said, in the case of Peacock v. The Republic of Hawaii, 11 Haw., p. 404, 410:

"What are retrospective laws? The definition is not "wholly entymological; it is largely historical. To hold "that every law that 'looks backward' is unconstitu- "tional, would be absurd; it would tie the hands of the "Legislature so as to prevent all sorts of salutary laws "harmful to no one. 'Retrospective laws,' have, there- "fore, come to have much the same meaning as 'ex post "facto laws,' 'laws impairing the obligation of con- "tracts,' &c. While these phrases apply in whole or in "part to different subject matters, they in general "mean laws that impair vested rights; and in general "so long as laws do not impair vested rights they are "not unconstitutional because retrospective."

Gauging the case at bar by the simple yet extremely

potent language of the Peacock case, there can be no question of the validity of Act 23.

Counsel for the petitioner in this case, in the lower court, endeavored to sho wthat it had been the custom existing prior to the passage of Act 23, for the Registrar of Conveyances to receive and record instruments to which were attached maps or plats of real estate, upon the theory that there was a vested right accrued to the United States at the time of the institution of the condemnation proceedings, to file and have received for recordation a certified copy of the final order of condemnation, which contained a map of the property condemned. We objected upon the trial that it was absolutely immaterial what custom had theretofore prevailed, but over such object evidence was admitted to that effect. But even admitted that such was the custom, we respectfully submit that whatever right may have existed in the United States at the time of the institution of the condemnation proceedings that right is still maintained to it in a practically similar form. It is unlawful for the Registrar of Conveyances to accept for record and record any plan or map of land, but it is not unlawful for the Registrar to receive a map or plan properly prepared in accordance with the provisions of Sections 1, 2 and 3 of the Act, for the purpose of filing the same in his office. The United States can desire the presence of a map in the office of the Registrar of Conveyances for one purpose only—greater certainty in the final order of condemnation in the description of the premises subject to the order—fuller and more complete data of which to place third parties on notice under the provisions of the registry law. Had the United States authorities seen fit, they could have preserved unto the United States all for which they are now contending in this particular proceeding. The Act

went into effect before the United States had secured its judgment. The final order of condemnation, by appropriate language and references, could have made as a detachable part thereof, a map in compliance with the Act, and upon the recordation of the judgment, and the filing of the map, third parties would have been bound by all information as to title which the recorded judgment and the filed map would reasonably have led them. The only difference is that the United States, either in ignorance of or in a desire to perform its acts contrary to Act 23, secured a judgment to which, as an inseparable part thereof, was attached a map which did not comply with either Section 1, 2 or 3 of the Act, instead of securing a final order of condemnation which referred to a map which would, upon presentation, be entitled to filing. And this non-compliance is admitted by its failure to deny the allegations to that effect in respondents answer, and stands as undisputed in the case. Obviously nothing has been taken from the United States by the enactment of the provision relative to the filing of maps. By complying with its provisions the same rights, duties and liabilities attach to third parties upon recordation of a final order of condemnation referring to a filed map, the only difference being in the method by which recordation is secured. Why the authorities should prefer the method that they have adopted is difficult for us to imagine. No greater rights can be secured by the recordation of the final order in the shape in which it was presented. And either before the institution of these mandamus proceedings or this appeal petitioner could have amended its judgment in accordance with the provisions of the act, and still reserved to itself all rights previously existing either by law or custom.

THE LEGAL DUTY WHICH THE REGISTRAR OF CONVEYANCES MAY BE COERCED TO PERFORM IS TO RECEIVE FOR RECORDATION AND RECORD A FINAL ORDER OF CONDEMNATION AND NOT A JUDGMENT IN A CONDEMATION PROCEEDINGS.

We furthermore respectfully submit that the petitioner in this case is not entitled in any case to prevail. It is unnecessary to cite authorities upon the general proposition that mandamus will only lie to compel or coerce the public officer to perform a duty as prescribed by law. The instrument which is the subject of this action is not a final order of condemnation but a judgment secured in the condemnation proceedings. The local statutes distinguish between them and it is only the final order of condemnation that is entitled to recordation. Section 502 of the Revised Laws provides as follows:

"Sec. 502. Decision. The court shall have power to "determine all adverse or conflicting claims to the prop- "erty sought to be condemned and to the compensa- "tion or damages to be awarded for the taking of the "same."

Upon a decision the prevailing party secures his judgment. This is recognized by the provisions of Section 505 of the Revised Laws. It is as follows:

"Sec. 505. Payment of judgment, penalties. The "plaintiff must within two years after final judgment "pay the amount assessed as compensation or damages; "and upon failure so to do all rights which may have "been obtained by such judgment shall be lost to the "plaintiff; and if such payment shall be delayed more "than thirty days after final judgment, then interest "shall be added at the rate of seven per cent. per an-

"num. Such payment shall be made to the clerk of the "court rendering the judgment, who shall distribute "the same in accordance with the order of the court. If "the plaintiff shall fail to make such payment as afore-"said, the defendant shall be entitled to recover his "costs of court, reasonable expenses and such damage "as may have been sustained by him by reason of the "bringing of the action."

Under the provisions of Section 505 therefore, upon the securement by the petitioner of the "Waterhouse" judgment, it was its duty to pay into court the amount assessed as compensation for damages, and it was only upon such payment that under the provisions of Section 506 was it entitled to a final order of condemnation. It does not appear in this case that the assessed compensation for damages has ever been paid. As a matter of fact it has not. The instrument presented to the Registrar of Conveyances for the purposes of recordation was simply a final judgment. The United States has never as yet secured a final order of condemnation. And until it does secure such order it is not in a position to demand of the recording official that it place any other instrument upon record. It is the duty of the Registrar of Conveyances to receive a certified copy of the final order of condemnation, the contents of which comply with the provisions of Section 506. Further than that he need not go and the trial court was without jurisdiction to entertain this proceeding to coerce the Registrar to file a certified copy of a judgment under the provisions of the law pertaining to condemnation in contra-distinction to a final order of condemnation.

MANDAMUS DOES NOT LIE TO SECURE THE RECORDATION OF A DEED EXECUTED BY PARTIES RESPONDENT TO A PETITIONER IN CONDEMNATION PROCEEDINGS TRANSFERRING TO THE PETITIONER IN COMPLIANCE WITH A JUDGMENT IN CONDEMNATION THE PROPERTY SUBJECT TO THE PROCEEDING.

We desire at the outset to make an apology to the court. Under the assignments of error numbered 13, 15, 16, 17, 18 and 19, we take it that the plaintiff in error could ask this court to review, and it would review, the decision of the trial judge upon the respondent's plea to the jurisdiction. Under the rules of this court it is impossible, in the preparation of briefs here in Honolulu, to await the receipt of appellee's brief. The number of steamer calls at this port makes it obligatory upon the defendant in error or appellee to prepare his brief in advance so that it will be received by the Clerk in San Francisco within the time prescribed by the rules. We cannot say in advance that the plaintiff in error will not call to the attention of this Court the order of the trial judgment dismissing the petition as to the deed from the Waterhouse heirs to the United States, and therefore in an abundance of caution we present to this Court our points and authorities in that regard.

Section 629 of the Revised Statutes of the United States, Section 11 of the Act of September 24th, 1789, in defining the jurisdiction of the United States Circuit Courts, does not expressly include the authority to issue a writ of mandamus.

Riggs v. Johnson., 6 Wall., 166;
Knox v. Aspinwall, 24 How., 376;
Greene County v. Daniel, 102 U. S., 195;

Davenport v. County of Dodge, 105 U. S., 237;
Rosenbaum v. Bauer, 120 U. S., 450;
Bath Co. v. Amy, 13 Wall., 237;
State v. Lake Erie & W. Ry. Co., 85 Fed., 1.

Neither do the Revised Statutes of the United States, applicable to circuit and district courts, contain any express authority to issue a writ of mandamus.

Section 716 of the Revised Statutes of the United States (Section 14, Sep. 24, 1789), permits the issuance of "Writs not specifically provided for by Statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

Its issuance "must be necessary for the exercise of.... jurisdiction.

McIntyre v. Wood, 7 Cranch., 504 (1813).
McCluny v. Silliman, 2 Wh., 369 (1817).
Smith v. Bourbon Co., 127 U. S., 105, 112 (1887).

A writ of Mandamus cannot be used in the United States Circuit Court as an original writ.

Smith v. Jackson, Fed. Cas. No. 13064;
U. S. ex rel Weed v. Smallwood, Fed. Cas. No. 61315;
U. S. ex rel Seeger v. Pearson, 32 Fed., 309;
Hitchcock v. City of Galveston, 48 Fed., 640;
State ex rel City of Columbus v. C. & H. R. Co., 48 Fed., 626;
In re Bintschger, 50 Fed., 459, 461;
Gares v. M. W. & B. & L. Assn., 55 Fed., 209, 210;
U. S. ex rel Co. of Iron v. Severance, 71 Fed., 768;
U. S. v. The Judges, 85 Fed., 177.

Its issuance must be "agreeable" to the usages and principles of law"

Riggs v. Johnson Co. (supra);
Knox Co. v. Aspinwall, 24 How., 376 (1860).

USAGE AS EXECUTION.

In its function it is a substitute for execution.

Bath Co. v. Amy, 13 Wall., 244 (1871);
Green Co. v. Daniel 102, U. S., 187 (1880);
United States v. Schurz, 102, U. S., 378 (1880);
Louisiana v. Jumel, 107, U. S., 711, 727 (1882);
Rosenbaum v. Bauer (supra);
Heine v. Commissioners, 19 Wall., 655 (1873);
Graham v. Norton, 15 Wall., 427 (1872);
Davenport v. Dodge, 105, U. S., 235 (1881),
Stewart v. The Justices, 47, Fed., 482, 484;
Labette Co. v. Wanderly, 92, Fed., 314, 316;
U. S. ex rel Field v. Township of Oswego, 28 Fed., 55;
Thompson v. Perris Irrigation Dist., 116, Fed., 769;
Webber v. Lee Co., 6 Wall., 209, 210 (1867).

Principles relative to Mandamus must be present.

Riggs v. Johnson Co. (supra);
Labette Co. Commissioners v. U. S., 112, U. S., 217;
Lower v. United States, 91, U. S., 536;
Laird v Mayor of de Sotto, 25, Fed., 76;
Board of Commissioners Grand County v. King, 67, Fed., 202;
City of Cleveland Tenn. v. U. S., 111, Fed., 343, 349.

The duty the performance of which the writ requests must be clear and undisputable.

U. S. ex rel Boyton v. Blain, 139, U. S., 306;
U. S. v. Black, 128, U. S., 40.

Hereunto annexed may be found the local law of the Territory concerning eminent domain and registration of instruments effecting real and personal property.

It is respectfully submitted that the judgment of the lower courts should be sustained and that the appeal herein dismissed.

E. C. Peters.

E. C. PETERS,
Attorney General of Hawaii
for defendant in error.

CHAPTER 40.

EMINENT DOMAIN.

Sec. 491. Purposes for taking private property. Private property may be taken for the following purposes, which are declared to be public uses, to wit: sites for public buildings, fortifications, magazines, arsenals, navy yards, navy and army stations, light-houses, range and beacon lights, cemeteries, quarantine stations, pest-houses, hospitals, dumping places for garbage and refuse material, wharves, docks, piers, dams, reservoirs and bridges, also all necessary land over which to construct roads, canals, ditches, flumes, acqueducts, pipe lines and sewers; also all necessary land for the growth and protection of forests, public squares and pleasure grounds; also all necessary land for improving any harbor, river or stream, removing obstructions therefrom, widening, deepening or straightening their channels; also all necessary material for the construction of any public work.

Sec. 492. Only for public use. No property shall be taken by virtue of this chapter unless it shall appear that it is to be put to some public use, and that the taking is necessary to such use.

Sec. 493. Fee Simple may be acquired. A fee simple estate may be acquired for all the purposes mentioned in Section 491.

Sec. 494. What property may be taken. Property which may be taken by virtue of this chapter includes: All real estate belonging to any person or persons, or corporations, together with all structures and improvements thereon, franchises or appurtenances thereunto belonging, water, water rights and easements, also all property heretofore appropriated to some public use; provided, however, that in such case it must appear that

the use to which said property is sought to be put is a more necessary public use than that to which it has already been appropriated.

Sec. 495. Entering and surveying land. Any agent or servant to the Territory may, for the purpose of locating or surveying land to be condemned in accordance with the provisions of this chapter, enter upon the same and make examinations and surveys, and such entry shall not constitute a cause of action in favor of the owner of the land, except for damages resulting from negligence on the part of such agent.

Jurisdiction and Procedure.

Sec. 496. Circuit courts have jurisdiction. The circuit courts shall have power to try and determine all actions arising under this chapter, subject only to an appeal to the supreme court in accordance with law.

Sec. 497. Procedure as in civil actions. Where not otherwise expressly provided in this chapter, the procedure shall be the same as in other civil actions.

Sec. 498. Plaintiff. The superintendent of public works acting in his official capacity may institute proceedings on behalf of the Territory of Hawaii for the condemnation of property as provided for in this chapter and the superintendent of public works may be referred to in this chapter as the plaintiff.

Sec. 499. Petition, defendants, different properties in one action. Actions under and by virtue of this chapter, must be commenced by filing a petition and issuing a summons thereon. All persons who are owners or claimants of the properties sought to be condemned must be joined as defendants; provided however, that in case the owner or claimant is unknown to plaintiff it shall be sufficient if the petition includes a

statement of that fact, and such defendant may be joined in the petition under a fictitious name. The petition must also contain a statement of the use to which the land sought to be condemned is to be put, a description of each and every piece of land sought to be condemned, and whether the same includes the whole or only a part of an entire tract or parcel. A map must accompany the complaint which shall correctly delineate the land sought to be condemned and its location.

All property necessary for any public use may be united in one action.

Sec. 500. Notice. When the defendant or claimant of the land sought to be condemned is known, the summons shall be served by delivering to him a certified copy thereof, together with a copy of the plaintiff's petition. In case the defendant or claimant, although known, cannot be found it shall be sufficient to leave said certified copy with some agent or person transacting the business of the defendant or claimant, or by leaving the same at his last known place of business or residence. In case the defendant, although known, was never a resident of the Hawaiian Islands, or has removed therefrom, or if the defendant or claimant is unknown then the service of the summons upon such defendant or claimant may be made by publication thereof, in some newspaper published in the Territory of Hawaii, for such time as may be ordered by the court, not less than three months. The service of summons, as provided for in this section, shall be sufficient to give the court jurisdiction to proceed with and finally determine the case.

Sec. 501. Intervenors. Any person in occupation of or having any claim or interest in any property sought

to be condemned or in the damages for the taking thereof though not named in the complaint, may appear, plead, and defend in respect to his own property or interest, in like manner as if named in the complaint.

Sec. 502. Decision. The court shall have power to determine all adverse or conflicting claims to the property sought to be condemned and to the compensation or damages to be awarded for the taking of the same.

Sec. 503. Damages assessed, how. In fixing the compensation or damages to be paid for the condemnation of any property, the value of the property sought to be condemned and all improvements thereon, shall be separately assessed; and if the property sought to be condemned constitutes only a portion of a larger tract the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff shall also be assessed; and also how much the portion not sought to be condemned will be benefitted, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the amount of compensation assessed for the property taken, and for damages by reason of its severance from another portion of the same tract, then the owner shall be allowed no compensation, but if the benefits shall be less than the amount so assessed as damages or compensation, then the former shall be deducted from the latter and the remainder shall be the amount awarded as such compensation or damages.

Sec. 504. Assessed as of day of summons. For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of summons, and its actual value at that date shall

be the measure of valuation of all property to be condemned, and the basis of damages to property by reason of its severance from the portion not sought to be condemned, subject however, to the provisions of Section 503.

No improvement put on the property subsequent to the date of the service of the summons shall be included in the assessment of compensation or damages.

Sec. 505. Payment of judgment, penalties. The plaintiff must within two years after final judgment pay the amount assessed as compensation or damages; and upon failure so to do all rights which may have been obtained by such judgment shall be lost to the plaintiff; and if such payment shall be delayed more than thirty days after final judgment, then interest shall be added at the rate of seven per cent. per annum. Such payment shall be made to the clerk of the court rendering the judgment, who shall distribute the same in accordance with the order of the court. If the plaintiff shall fail to make such payment as aforesaid, the defendant shall be entitled to recover his costs of court, reasonable expenses and such damage as may have been sustained by him by reason of the bringing of the action.

Sec. 506. Final order of condemnation. When all payments required by the final judgment have been made, the court shall make a final order of condemnation, which must describe the property condemned and the purposes of such condemnation, a certified copy of which must be filed and recorded in the office of the registrar of conveyances; and thereupon the property described shall vest in the plaintiff.

Possession Pending Appeal.

Sec. 507. By plaintiff, when; interest. At any time after judgment has been rendered in the circuit court

for or in favor of the plaintiff, or pending an appeal to the supreme court by either plaintiff, or defendant, the plaintiff may be put into possession of the land sought to be condemned upon the payment into the court of the amount assessed as compensation or damages; subject, however, to the payment of such further compensation or damages as may be subsequently awarded. Upon the payment of the money assessed as compensation or damages as aforesaid, the court shall make an order putting plaintiff into possession of the property sought to be condemned with the right to use the same during the pendency of and until the final conclusion of the litigation. The defendant who is entitled to the money paid into the court as aforesaid shall have the right to demand and receive payment of the same at any time thereafter, upon filing a receipt therefor, to the satisfaction of all claims on the lands sought to be condemned. Upon such payment being made to the defendant, the court shall make the final order of condemnation as provided for in Section 506.

If an order be made letting the plaintiff into possession, as provided for in this section, compensation and damages awarded shall draw lawful interest from the date of such order.

TITLE XX.

CONVEYANCES, ETC.

CHAPTER 151.

Registration of Conveyances.

REGISTRAR, DEPUTY, AGENTS TO TAKE ACKNOWLEDGMENTS.

Sec. 2352. Register, appointment, tenure. There shall be a bureau in the department of the treasury to be called the bureau of conveyances, and the governor shall appoint, upon the nomination of the treasurer, some suitable person to superintend said bureau, under the direction of said treasurer, who shall be styled the "registrar of conveyances," and hold his office at the pleasure of the governor.

Sec. 2353. Oath, bond. Said registrar shall take an oath faithfully to discharge the duties of his office, and he shall give to the treasurer, for the benefit of the public, a bond in the penalty of at least one thousand dollars, conditioned to answer to any party aggrieved, upon assignment thereof, for any damages, losses or injuries sustained by reason of his negligence, carelessness or misconduct in office or by reason of false certificates of search or incumbrance by him at any time made or given, to the detriment of the party prosecuting.

Sec. 2354. Deputy registrar, appointment, duties. The said registrar shall, under the direction of the treasurer, appoint a deputy, for whose official acts he shall be responsible, and whose appointment he shall cause to be announced in a newspaper or newspapers suitable for the advertisement of notices of judicial proceedings. It shall be the duty of such deputy to act as registrar of

conveyances, during the absence of the registrar, or in case of a vacancy in that office.

Sec. 2355. Agents to take acknowledgments, appointment. The said registrar may, under the direction of the treasurer, appoint suitable persons, throughout the Territory, as agents for taking and certifying the acknowledgment of instruments, to be recorded in his office.

DUTIES OF REGISTRAR.

Sec. 2356. Fees. The said registrar shall be entitled to demand and receive the following fees, viz.:

1. For the registry of any deed, lease, mortgage, or other instrument required by law to be recorded, or presented for record, fifty cents for one hundred words;

2. For taking any acknowledgment preparatory to registry, one dollar for each party signing;

3. For every copy of any instrument recorded in this office, authenticated by his seal of office, fifty cents for one hundred words;

4. For searching the records, and giving the certificate required by law, twenty-five cents for each year searched.

Such fees shall be paid into the public treasury weekly, and a monthly account thereof shall be rendered by the said registrar to the treasurer.

The registrar of conveyances shall receive such salary as may be appropriated by the legislature.

Sec. 2357. Attested copies, certificates. The registrar of conveyances shall, when applied to therefor, furnish an attested copy of any instrument or document recorded in his office, and he shall also give certificates of search or incumbrance, or of any fact appearing upon

his records, upon being paid the fees hereinbefore specified.

Sec. 2358. Recording, method. It shall be the duty of the registrar of conveyances to make an entire literal copy of all instruments required to be recorded in his office, in books suitable for that purpose, which shall be provided by the treasurer, and at the foot of said copy certify its correspondence with the original, after which he shall certify upon the exterior, or indorse upon said recorded instrument, the date of its registry, the book in his office in which, and the page of said book at which it was registered.

Sec. 2359. Order of recording. Every instrument entitled by law to be recorded, shall be recorded in the order, and as of the time when the same shall be delivered to the registrar for that purpose, and shall be considered as recorded from the time of such delivery.

PREREQUISITES TO RECORDING.

1. Stamps.

Sec. 2360. To be affixed. It shall not be lawful to record any conveyance, or other instrument required by law to be stamped, unless the same shall have been previously stamped, as provided in Chapter 101.

2. Acknowledgments.

Sec. 2361. How made; proof if not made. To entitle any conveyance, or other instrument to be recorded, it shall be acknowledged by the party or parties executing the same, before the registrar of conveyances, or his agent, or some judge of a court of record or notary public of this Territory, or before some notary public or

judge of a court of record in any foreign country. But if any party to an instrument executed within this Territory shall die, or depart from the Territory without having acknowledged his deed, or shall refuse to acknowledge it, the deed may be entered of record on proof of its execution by a subscribing witness thereto, before any judge of a court of record of this Territory. If all the subscribing witnesses to such conveyance or other instrument shall be dead or out of the Territory, the same may be proved before any court of record in this Territory by proving the handwriting of the grantor and any subscribing witness.

Sec. 2362. Identification of person making. No acknowledgment of any conveyance or other instrument, whereby any real estate is conveyed or may be affected shall be taken, unless the person offering to make such acknowledgment shall be personally known to the officer taking the same to be the person whose name is subscribed to such conveyance or instrument as a party thereto, or shall be proved to be such by the oath or affirmation of a credible witness known to the officer.

Sec. 2363. Certificate, contents. The certificate of such acknowledgment shall state the fact of acknowledgment and that the person making the same was personally known to the officer granting the certificate to be the person whose name is subscribed to the instrument as a party thereto, or was proved to be such by the oath or affirmation of a credible witness known to the officer whose name shall be inserted in the certificate.

Sec. 2364. Form when person known. Such certificate shall be substantially in the following form, to wit:

Island of ..... }
Territory of Hawaii, } ss.

On this.....day of....., A. D. ....., personally appeared before me A. B., known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein set forth.

Sec. 2365. Form when person unknown. When the person offering the acknowledgment is unknown to the officer taking the acknowledgment, the certificate shall be substantially in the following form, to wit:

Island of..... }
Territory of Hawaii, } ss.

On this.....day of....., A. D. ....., personally appeared before me A. B., satisfactorily proved to me to be the person described in and who executed the within instrument, by the oath of C. D., a credible witness for that purpose, to me known and by me duly sworn, and he, the said A. B., acknowledged that he executed the same freely and voluntarily for the uses and purposes therein set forth.

Sec. 2366. No other certificate valid. No certificate of acknowledgment contrary to the provisions of Sections 2362-2366, 2369 shall be valid in any court of this Territory, nor shall it be entitled to be recorded in the registry of public conveyances.

But no certificate of acknowledgment executed before July 29, 1872, shall in consequence of anything in said sections contained be deemed invalid.

Sec. 2367. Acknowledgment of release of dower. It shall not be lawful to enter of record any release of

dower in lands or other property, signed by an undivorced wife, without her previous acknowledgment to the registrar of conveyances, or one of his agents, or some officer authorized to receive such acknowledgment, apart from her husband, that she had signed such release without compulsion, fear or constraint from her husband.

Sec. 2368. Certificate, indorsed on instrument. Every officer who shall take the acknowledgment or proof of any instrument, shall indorse a certificate thereof, signed by himself, on the instrument, and in cases of proof give the names of the witnesses examined before him, their places of residence, and the substance of the evidence by them given.

Sec. 2369. Penalty for false certificate. Any officer authorized to take acknowledgments to instruments who shall knowingly incorporate in the certificate of acknowledgment any false or misleading statement as to the facts therein contained, shall on due proof thereof, be punished by fine not to exceed one hundred dollars, or by imprisonment at hard labor not to exceed two months, or both. Nothing in this section contained shall be construed to do away with the liability for civil damages for such act.

3. Interlineations, Erasures, Etc.

Sec. 2370. Noted in instruments. It shall be the duty of every notary public or the officer authorized to take acknowledgments to instruments, before taking any acknowledgment, to first carefully inspect any instrument proposed to be acknowledged before him, and ascertain whether there are any interlineations, erasures or changes in such instrument. If there are any such interlineations, erasures or changes, he shall call the attention thereto of the person offering to acknowledge

such instrument, and if they are approved by such person, the said acknowledging officer shall place his initials in the margin of said instrument opposite each such interlineation, erasure or change, and shall note at the foot of instrument before the acknowledging clause what each such interlineation, erasure or change consists of, and the number of the page and line on which it occurs.

Sec. 2371. Penalty for not noting. Every notary public or other person authorized to take acknowledgments to instruments who shall take the acknowledgment of any person to any instrument in which there are interlineations ,erasures or changes, and who shall fail to observe or perform the requirements, of any of them, of the last preceding section, shall be liable, upon conviction thereof, to a fine not to exceed the sum of two hundred dollars.

Sec. 2372. Not recorded unless noted. No instrument in which there are interlineations, erasures or changes shall be recorded by the registrar of conveyances, unless the same are duly initiated and noted by the officer or officers taking the acknowledgment or acknogledgments to the same.

Sec. 2373. Noted in record. Each and every interlineation, erasure or change made in any record in the office of the registrar of conveyances, shall be initialed in the margin by the registrar or his deputy, and the interlineation, erasure or change made shall be noted at the foot of the record in the handwriting and over the signature of the registrar or of his deputy.

RECORDS OF ACKNOWLEDGMENTS.

Sec. 2374. To be kept. All judges and other officers authorized by law to take acknowledgments to instruments, besides the certificate of acknowledgment in-

dorsed upon the instrument, shall keep a record of every acknowledgment in a book of records. Each record shall set forth at least the date of acknowledgment, the parties to the instrument, the persons acknowledging the date and some memorandum as to the nature of the instrument acknowledged.

Sec. 2375. Disposition of records. The books of record so kept shall every five years beginning with July 1, 1893, and upon the resignation, death or removal from office of such judge or other officer, be deposited with the clerk of the court of record nearest the place where such judge or other officer resided.

Sec. 2376. Same, open to inspection. The clerks of the several courts of record shall carefully preserve the books of record deposited with them as provided herein, filing the same with the records of the court. Such records, both while in the custody of such acknowledging officers and after such filing, shall be open at all reasonable times to the inspection of any responsible person, without fee or reward.

Sec. 2377. Penalty for not keeping. Any of the officers to take acknowledgments aforesaid, who shall fail to keel the record herein directed, or upon failure to deposit the same with a clerk of a court of record as directed shall be liable to pay a fine of not less than fifty dollars nor more than two hundred and fifty dollars, which may be recovered of such officer, his executors or administrators.

EFFECT OF STAMPING, ACKNOWLEDGING, RECORDING, NOT RECORDING.

Sec. 2378. Instruments may be recorded; as evidence. Every conveyance or other instrument, stamped and acknowledged or proved, and certified in the manner

hereinbefore prescribed, by any of the officers before named, may be read in evidence without further proof thereof, and shall be entitled to be recorded.

Sec. 2379. Record or copy as evidence. The record of an instrument duly recorded, or a transcript thereof, duly certified, may also be read in evidence, with the like force and effect as the original instrument. Neither the certificate of acknowledgment, nor the proof of any instrument, shall be conclusive, but may be rebutted, and the force and effect thereof may be contested by any party affected thereby. If the party contesting the proof of an instrument shall make it appear that such proof was taken upon the oath of an interested or incompetent witness, neither such instrument nor the record thereof shall be received in evidence until established by other competent proof.

Sec. 2380. Effect of not recording deeds, leases, etc. All deeds, leases for a term of more than one year, or other conveyances of real estate within this Territory, shall be recorded in the office of the registrar of conveyances, and every such conveyance not so recorded shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, not having actual notice of such conveyance, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded.

Sec. 2381. Chattel mortgages, etc. All mortgages of chattel property, indentures of apprenticeship, articles of marriage settlement, powers of attorney for the transfer of real estate within this Territory, and agreements of adoption, shall, in order to their validity, be recorded in the office of the registrar of conveyances, in default of which no such instrument shall be binding to the detri-

ment of third parties, or conclusive upon their rights and interests.

Sec. 2382. Old records, etc., valid. All records of instruments made in the office of the registrar of conveyances, anterior to the tenth day of July, A. D. 1850, whether in the book required by law or otherwise, shall be deemed to have been duly recorded.

All conveyances of real and personal property made and executed anterior to April 27, 1846, and all pledges of property, real or personal, executed anterior to said date, the conditions of which had not been fulfilled before the promulgation of the act of April 27, 1846, shall, if not recorded in the office of the registrar of conveyances at the instance and expense of the grantee or mortgagee, within ninety days after said promulgation, be void in law as against subsequent grantees and mortgagees of the same property, not having notice of the existence of such previous conveyances or pledges.

E. C. Peters
Atty General of Hawaii
for dept in Emm
W. A. Rowe
Deputy Atty General